

MOTION FILED
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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1976

No. 76-576

**BUREAU OF REVENUE OF THE
STATE OF NEW MEXICO,**

Petitioner,

v.

EASTERN NAVAJO INDUSTRIES, INC.

Respondent.

**MOTION OF VLASSIS, RUZOW & LINZER
FOR LEAVE TO FILE A BRIEF AMICUS
CURIAE IN RESPONSE TO PETITION
NO. 76-576 AND BRIEF AMICUS CURIAE
IN OPPOSITION TO CERTIORARI**

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EASTERN NAVAJO INDUSTRIES, INC.

Respondent.

MOTION FOR LEAVE TO FILE AMICUS
CURIAE BRIEF UNDER RULE 42 IN
RESPONSE TO PETITION NO. 76-576

Pursuant to Rule 42 of the United States Supreme Court, Vlassis, Ruzow & Linzer respectfully move this Court for leave to file an amicus curiae brief herein on behalf of Respondent, Eastern Navajo Industries, Inc.

Petition for Certiorari was filed by the Bureau of Revenue of the State of New Mexico on October 23, 1976. Respondent, Eastern Navajo Industries, Inc., did not file a brief in opposition and on December 6, 1976, this Court requested a response. Respondent is a defunct corporation and the attorney representing it during the New Mexico state court litigation has declined further representation of the now non-existent entity before this Court.

The principal assets of Respondent were acquired by the Navajo Housing and Development Enterprise, an enterprise of the Navajo Tribe, and the Clerk of this Court contacted the attorney for Navajo Housing and Development Enterprise, Larry Lamb, Esq., who also declined to file a response on behalf of Eastern Navajo Industries, Inc.

The Clerk of the Court then approached our firm inquiring, whether as General Counsel for the Navajo Nation, we would assume representation of Eastern Navajo Industries, Inc. and file the response requested by the Court. Without the authorization of the Navajo Tribal Council, we are unable to act as attorneys for Eastern Navajo Industries, Inc., a New Mexico Corporation for profit, nor can we file an amicus brief on behalf of the Navajo Nation itself. The Navajo Tribal Council is not now in session nor will it reconvene before mid-April 1977 and until that time, we will be unable to obtain such authorization.

Nevertheless, the fact remains that a Court of Appeals of the State of New Mexico has broken with tradition and has construed state law in favor of an Indian entity and against the state Bureau of Revenue. This Court has devoted much of its time to reversing or vacating the decisions of state courts which have ruled against Indians. Bryan v. Itasca County, 426 U.S. 373 (1976); Antoine v. Washington, 240 U.S. 194 (1975); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), rev'd in part and aff'd in part; McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Tonasket v. Washington, 411 U.S. 451 (1973); Mattz v. Arnett, 412 U.S. 412 (1973); Washington Game Dept. v. Puyallup Tribe, 414 U.S. 44 (1973); Kennerly v. District Court, 400 U.S. 423 (1971); Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965); Seymour v. Superintendent, 368 U.S. 351 (1962); Metlakatla Indian Comm'n v. Egan, 369 U.S. 45 (1962); and Williams v. Lee, 358 U.S. 217 (1959). The New Mexico Bureau of Revenue, rather than seek redress in the state legislature, has chosen to submit to this Court a Petition for Certiorari requesting review of the state court decision. We believe this Court lacks the requisite jurisdiction for such a review, and even if there is jurisdiction, appropriate exercise of the discretion inherent in a Certiorari proceeding should preclude review.

With volunteers in apparent short supply to uphold the position of Eastern

Navajo Industries, Inc., with a decision bearing on the future of Indian businesses on the Navajo Reservation brought before this Court in a Petition for Certiorari, with this Court's December 1976 request for a response to that petition thus far unanswered, with the Navajo Tribal Council out of session until mid-April 1977, we respectfully request leave to file this amicus curiae brief on behalf of Respondent, Eastern Navajo Industries, Inc., in the sole name of our firm, Vlassis, Ruzow & Linzer.

Should this request be so unusual as to require a denial of this motion for leave to file an amicus curiae brief, we would respectfully request that this Court defer consideration of this motion until mid-April, at which time the Navajo Tribal Council will reconvene and will be able to consider its entry into this litigation on behalf of Respondent.

We, therefore, respectfully request permission to file this brief under Rule 42 of the Supreme Court of the United States.

Respectfully submitted,

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March 25, 1977

BRIEF AMICUS CURIAE FOR RESPONDENT, EASTERN NAVAJO INDUSTRIES, IN OPPOSITION TO CERTIORARI

Vlassis, Ruzow & Linzer hereby submit their brief in opposition to the Petition filed in No. 76-576, for a writ of certiorari to review the judgment of the New Mexico Court of Appeals entered in this case on June 29, 1976.

ARGUMENT

1. The New Mexico Court of Appeals Decided a Matter of State Law Concerning the Application of its Gross Receipts Tax and its Determination is Controlling.

The precise holding of the New Mexico Court of Appeals in Eastern Navajo Industries, Inc. v. Bureau of Revenue, 89 N.M. 369, 552 P.2d 805 (1976), cert. denied, No. 11038 (N.M. Supreme Court, July 27, 1976), was that the state gross receipts tax is not applicable to receipts of a 51% Indian-owned corporation derived from business done on the Navajo Reservation with a Tribal enterprise established by the Navajo Tribal Council to improve housing for Indians on the Reservation. This Court has recently reaffirmed the principle that a state's highest court is the final judicial arbiter of the meaning of state statutes, Gurley v. Rhoden, 421 U.S. 200 (1975); and this Court "repeatedly has held that state courts are the ultimate expositors of state

law (citations omitted) and that we are bound by their constructions except in extreme circumstances." Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). Furthermore, this Court has stated that it will respect the judgment of a state court as to the fair intendment of a state granted tax exemption. Atlantic Coast Line R.R. v. Phillips, 332 U.S. 168 (1947).

A tax is an exaction, and ascertainment of the scope of the exaction -- what is included in it -- is for the state court. Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940). On matters of construction of state statutes, this court will defer to the state court interpretation. Illinois Central R.R. v. Minnesota, 309 U.S. 157 (1940); J. Bacon & Sons v. Martin, 305 U.S. 380 (1939). This deference extends to determinations of the incidence of the tax by the state court. This court has held such determinations are controlling. Federal Land Bank of St. Paul v. Bismark Lumber Company, 314 U.S. 95 (1941).

These decisions reflect the long-standing policy of this Court not to review state court determinations concerning the application and effect of state statutes. In the present case, the New Mexico Court of Appeals has made a determination concerning the application of a state gross receipts tax to a state corporation and this Court should deny the petition for certiorari to review the judgment. Such a denial will be in keeping with this

Court's holding in Atlantic Coast Line R.R. v. Phillips, *supra*, that when dealing with a matter of local policy, like a system of taxation, it should be slow to depart from the construction of local statutes by local courts if there was no real oppression or manifest wrong in the results. Petitioner has failed to demonstrate the "real oppression or manifest wrong" in the present case.

2. The New Mexico Court of Appeals Took Judicial Notice of Certain Federal Regulations, but Based its Decision on Non-Federal Grounds and no Substantial Federal Question has been Presented to this Court.

Petitioner asserts that the New Mexico Court of Appeals has created a conflict between federal law and New Mexico law. The New Mexico Court of Appeals holds that the application of a state tax law is improper under particular circumstances. Nowhere does the Court of Appeals suggest that such federal law invalidates a New Mexico statute. The court in reaching its decision takes judicial notice of a federal statute and certain regulations issued thereunder and takes judicial notice of provisions of the Navajo Tribal Code. Its decision, however, is also firmly grounded in state law.

Petitioner asserts the New Mexico Court of Appeals is using federal law

to "preempt" or "over-ride" state law, but this is not the case. The Federal statutes and regulations which Petitioner asserts were used to preempt state law were never relied on by the Court of Appeals from its decision but were looked to in a discussion by the court which considered provisions of the Navajo Tribal Code. This discussion was directed toward the resolution of the question of whether incorporation of a business by Indians would, under New Mexico law, preclude further consideration of the ethnicity of the stockholders.

In its opinion the New Mexico Court of Appeals never discusses the preemption doctrine nor does it make reference to the outstanding recent tax preemption case with respect to Indian Reservations. Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

Instead of relying on federal preemption to overturn the decision of the state tax commissioner, after having resolved the "corporate ethnicity" question, the court relies on Hunt v. O'Cheskey, 85 N.M. 381, 512 P.2d 954 (Ct. App. 1973), a New Mexico case concerning the proper application of the New Mexico gross receipts tax to Indians whose business is carried on upon Reservation land. Thus, the New Mexico Court did not use the preemption doctrine to invalidate a state statute but rather relied on state law to determine whether a particular

assessment of the state tax commissioner was in error.

It is a settled rule that this Court will not review a state court decision resting on an adequate and independent non-Federal ground even though the state court may have also summoned to its support a purportedly erroneous view of Federal law. Where the judgment of the state court rests on two grounds, one involving a Federal question and the other not, and the ground independent of a Federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945); Hedgebeth v. North Carolina, 334 U.S. 806 (1948).

Petitioner in Part 4 of its brief asks why the regulations cited by the New Mexico Court of Appeals require that the court look beyond the corporate form to the Indian ethnicity of the shareholders. This is not likely to be a profitable inquiry, since the decision of the New Mexico Court to look beyond the corporate form was based on a longstanding New Mexico decision, State T. & A. et al. v. Hermosa L. & C. Co., 30 N.M. 566, 240 P. 469 (1925) which the New Mexico Court of Appeals cited for the position that whenever necessary for the protection of the enforcement of the rights of the membership or shareholders, courts will disregard the legal fiction of a corporate existence separate and distinct from its membership or

shareholders.

This Court has stated that it reviews judgments, not statements in opinions, and that it is the duty of this Court to look beyond the broad sweep of the language in an opinion and determine for itself precisely the ground on which the judgment rests. Black v. Cutter Laboratories, 351 U.S. 292 (1956) (also holding that this Court should not pass on Federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds.)

The Court is even less likely to assume jurisdiction in a case, such as this, where the supreme court of the state has denied certiorari to review a lower court decision:

At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. Stembridge v. Georgia, 343 U.S. 541 (1952).

The Stembridge Court held it was without jurisdiction to review the state decision when the question of the existence of an adequate state ground is

debatable.

Petitioner concedes that the federal regulations were not the sole basis for the court's holding. The concluding paragraph of Part 1 of its argument states that the Court of Appeals has made its decision "in part on the strength of federal provisions permitting state corporations to receive funds if fifty-one percent of their shares is owned by Indians" (emphasis added).

Even assuming arguendo that the Court of Appeals has misconstrued the effect of certain federal regulations, the decision is grounded as well on a state court's interpretation and application of state law and, in keeping with the above-cited decisions of this Court, review should be denied.

The New Mexico Court of Appeals has determined the application of the state gross receipts tax and, while taking judicial notice of certain federal regulations in discussing the concept of an Indian corporation, has based its decision on the case law of the state. No substantial federal question has been presented for this Court's review.

Petitioner contends in Part 1 of its argument that this case stands "in marked contrast" to Murray v. State of Washington, 62 Wash.2d 619, 384 P.2d 337 (1963), appeal dismissed, 378 U.S. 580 (1964), and that this Court should therefore grant certiorari to

review the New Mexico decision.

The question of the propriety of the application of the tax in the Washington case was held by the Washington Supreme Court to be a matter of state law, a position concurred in by this Court which dismissed an appeal for want of a substantial federal question, 384 P.2d at 339.

In Murray, the Supreme Court of the State of Washington upheld the application of a state sales tax to a Delaware corporation formed to construct military housing in Washington state. In this case, the New Mexico Court of Appeals annulled the application of a state gross receipts tax to specific on-reservation activity of a New Mexico Corporation, a majority of whose stockholders were Navajos.

The only "contrast" is that in one case the highest court of a state upheld the application of a state tax, in the other, the highest court annulled the application.

Differing views as to the appropriate interpretation and application of differing state laws by different state courts may well result in opinions which show a "marked contrast," but this does not present a federal question which will serve as the basis for the grant of a Writ of Certiorari.

3. The Decision of the New Mexico Court of Appeals Does Not Conflict with the Decision of the Court of Appeals for the Fifth Circuit, Nor Could Such a Conflict, if One Did Exist, Serve as a Basis for Review by This Court.

Petitioner asserts that United States v. State Tax Comm'n of the State of Mississippi, 505 F.2d 633 (5th Cir. 1974) conflicts with the present case on the effect of incorporation of businesses by Indians under state law. Such an assertion is a misreading of the Mississippi decision, for the Fifth Circuit there limited itself to two questions, both of which it answered in the negative:

1. Was the United States the real party in interest where the taxpayer was a corporation comprised of Choctaw Indians?

2. Did the federal district court have jurisdiction over a taxpayer's dispute with the state tax commission?

Neither of these questions was before the New Mexico court, which concerned itself with determining the correct application of the state gross receipts tax. Since the courts were confronted with dissimilar issues, no conflict could exist with respect to their holdings.

In fact, the Fifth Circuit expressly withheld comment on the issue central to the decision of the New Mexico Court of Appeals: "We intimate no opinion as to the liability of the corporation to pay the tax. It is a matter of state law and, for lack of jurisdiction, is not before us." 505 F.2d at 643 (emphasis supplied).

In the present case the New Mexico Court of Appeals determined the liability of a corporation to pay a state tax and based the decision on New Mexico law. Thus, the New Mexico Court of Appeals spoke to the very issue concerning which the Fifth Circuit intimated no opinion for lack of federal court jurisdiction.

To establish a "conflict" Petitioner cites dicta from the Fifth Circuit decision concerning the matter of corporate status under the laws of Mississippi. The Petitioner would have this Court assert jurisdiction over a New Mexico court interpreting New Mexico corporate and tax law because dicta in a Fifth Circuit decision indicates that the corporate law of the state of Mississippi may differ from the corporate law of the state of New Mexico! Petitioner has failed to indicate how this "conflict" brings the present case within the jurisdiction of this Court under Title 28 U.S.C. § 1257(3).

4. The Decision of the New Mexico Court of Appeals is Not in Conflict with Prior Decisions of This Court.

Petitioner in Part 3 of his argument asserts that Respondent is not, in law or fact, an Indian. Nevertheless, the New Mexico Court of Appeals held that for purposes of the state gross receipts tax a 51% Indian-owned corporation doing business on a reservation with a Tribal enterprise will be treated as an Indian entity and its decision must prevail.. This Court has held in the cases reviewed in Part 1 of this brief that the construction of a state statute by a state court in circumstances such as those present here is controlling. Since the New Mexico Court of Appeals has characterized Respondent as "an Indian entity," the decisions of this Court relating to state tax jurisdiction over non-Indians and cited by Petitioner have little bearing on the present case.

Petitioner also contends in Part 3 of his argument that Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), precludes a finding by the New Mexico Court of Appeals that a state tax on an Indian corporation is an impermissible burden on Indian self-government. In Mescalero, this Court upheld a state tax on a Tribal enterprise operating off the reservation and placed great emphasis on the fact that the business activity taxed by the state was so situated. This opinion is not

controlling in the present case for the taxable activity occurred on the Navajo Reservation and thus comes within the McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973) holding which prohibited state taxation of Indians on Indian land absent Congressional authorization. The McClanahan Court observed that Tribes, immune from state taxation, are composed of individuals who are also immune. 411 U.S. at 181.

The New Mexico Court of Appeals has held that under state law a New Mexico corporation is also composed of individuals. The court further held that the Indian ethnicity of these individuals will prevent the application of the state gross receipts tax to corporate activity if 51% of the shareholders are Indians, if the corporate activity takes place on the reservation, and if the corporate services were rendered to a tribal enterprise in furtherance of the tribal goal of providing adequate housing on the reservation for Indians. This is a very narrow holding concerning a matter of state law and is not in conflict with the decisions of this Court.

Petitioner states that this Court sanctioned an affirmative burden on reservation Indians to collect and pay over a sales tax imposed on non-Indian purchasers in Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976). Petitioner asserts that in

the present case the gross receipts tax is levied only against a corporation, and that no Indian has any affirmative burden placed upon him. In Moe this Court stated that "this burden is not, strictly speaking, a tax at all," 425 U.S. at 463, since the required collection of a tax from customers was more in the nature of an administrative task than a financial burden. In the present case, the corporation was not asked to collect a tax; it was required to pay one. The burden placed on it by the state was direct and substantial. Nor is the tax "only" on the corporation, for the state court held that under New Mexico law a corporation is made up of its shareholders and that a tax levied on the corporation would, when necessary to protect the rights of the shareholders, be construed as a tax levied on the individual shareholders.

5. The New Mexico Court of Appeals Did Not Erroneously Rely Upon Federal Legislation Enacted After the Assessment Periods in Question.

The New Mexico Court of Appeals, in its discussion of Indian ethnicity as it relates to taxation of state corporations refers to an Indian Business Development Fund Act and paraphrases the language of 25 C.F.R. § 80.12 (1971) which is quoted in full earlier in the opinion. Petitioner points out in Part 4 of his argument that an Indian Business Development Fund Act does not exist under that name and that the Court

of Appeals may have intended to refer to the Indian Financing Act of 1974, Pub.L. 93-262, 88 Stat. 77, 25 U.S.C. §§ 1451 through 1543. The Indian Financing Act was enacted after the tax assessment and it, therefore, appears unlikely that the Court would have found the provisions of that Act persuasive. The intention of the Court of Appeals is made clear by reference to those regulations which it cites, 25 C.F.R. Part 80 (1971), which establish regulations to administer a new grant program under the authority of 25 U.S.C. § 13 (1970) and is entitled "Indian Business Development Fund." Presumably, the Court of Appeals reference to the Indian Business Development Fund Act was to these Federal regulations and not to the Indian Financing Act as Petitioner implies. Thus, Petitioner's supposition that state law was preempted by Federal law which did not exist at the time of the tax assessment is without merit and should not serve as a basis for review by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the peti-

tion for a writ of certiorari should be denied.

Respectfully submitted,

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